

**THE SUITABILITY OF TRADITIONAL DISPUTE RESOLUTION MECHANISMS
IN CRIMINAL MATTERS IN KENYA**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

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January 2018

Word count (10,989)

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ACKNOWLEDGMENTS

My deep gratitude to my supervisor, Mr. Francis Kariuki, for his expertly guidance, patience and encouragement throughout the study.

A very special thanks to Mr. Humphrey Sipalla for his encouragement and resources throughout the study.

My appreciation extends to my colleagues, who have been valuable in their encouragement and providing a positive atmosphere in which to do this study.

Above all, I am indebted to my family for their continuous support.

DECLARATION

I, SARAH WAIRIMU NJUGUNA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

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FRANCIS KARIUKI

ABSTRACT

Traditional dispute resolution mechanisms (TDRMs) have been used since time in memorial to resolves disputes, including criminal matters. However, since independence, they were used less frequently and perceived as inferior, in favour of the formal justice system. The Constitution of Kenya (2010) recognizes TDRMs and their application is provided for in various statutes and case law, but less so for criminal matters.

Despite the recognition of TDRMs in the Constitution and various statutes, criminal cases are still largely adjudicated by formal mechanisms, 8 years on. In addition, the application of TDRMs in criminal matters has been met with contrasting jurisprudence and uncertainty in the law. This study evaluates the suitability of TDRMs in criminal cases, more so in murder cases. The study analyses the legal framework, the nature of criminal matters and the challenges and prospects of using TDRMs to adjudicate criminal cases.

The study employs a qualitative approach in examining TDRMs and the nature of criminal matters. The review includes a study of TDRMs in relation to its nature, access to criminal justice and human rights. Through case studies of TDRMs in Rwanda, the study brought out the prominent features of TDRMs that make them suitable to resolve criminal matters. The informal, legitimate, community inclusive and restorative nature of TDRMs make them suitable for adjudicating criminal matters in Kenya.

In order to ensure that TDRMs are applied effectively to the resolution of criminal cases, the study recommends that the barriers hindering the application of TDRMs be removed. It also suggests that the due process and human rights concerns be addressed by developing a policy on TDRMs. In conclusion, the study makes the finding that TDRMs are suitable for resolving criminal matters in Kenya.

LIST OF ABBREVIATIONS

ACHmPR African Charter on Human and Peoples' Rights

CPC Criminal Procedure Code

DPP Director of Public Prosecutions

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

ICTR International Criminal Tribunal for Rwanda

TDRMs Traditional Dispute Resolution Mechanisms

UNDRIP United Nations Declaration on the Rights of Indigenous Peoples

UNGA United Nations General Assembly

LIST OF CASES

Bungoma District African Court Criminal Case No. 493 of 1967.

Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya, ACmHPR Comm 276/03.

Dancan Ouma Ojenge v P.N. Mashru Limited [2017] eKLR.

Dry Associates Limited v Capital Markets Authority & another [2012] eKLR.

Kosele African Court Criminal Case No. 33 of 1966.

Lubaru M'Imanyara v Daniel Murungi [2013] eKLR.

Raphael Lukale v Elizabeth Mayabi & another [2016] eKLR.

R v Abdulahi Noor Mohamed Alias Arab [2016] eKLR.

R v Lenaas Lenchura [2011] eKLR.

R v Mohamed Abdow Mohamed [2013] eKLR.

LIST OF LEGAL INSTRUMENTS

African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3.

Charter of the United Nations, 24 October 1945, 1 UNTS 24.

Constitution of Kenya (2010).

Constitution of Rwanda (2003).

Criminal Procedure Code (Act No. 12 of 2012).

Declaration of basic principles of justice for victims of crime and abuse of power, UN A/RES/40/34.

Environment and Land Court Act (Act No. 19 of 2011).

General comment no. 21, Article 15, Right of everyone to take part in cultural life, 21 December 2009.

General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007.

Indigenous and Tribal Peoples Convention, 27 June 1989, C169.

Intergovernmental Relations Act (Act No. 2 of 2012).

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

Judicature Act (Act No. 10A of 2012).

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Rio Declaration on Environment and Development, 14 June 1992.

The Office of the Director of Public Prosecutions Act (Act No. 2 of 2013).

UNGA, *Declaration of basic principles of justice for victims of crime and abuse of power*, UN A/RES/40/34 (29 November 1985).

United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295.

Victim Protection Act (Act No. 17 of 2014).

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 Background

Criminal matters are largely adjudicated by formal mechanisms such as litigation. Litigation is retributive (focus is on punishment rather than rehabilitation of the offender);¹ it is adversarial (results in a winner-loser outcome and power-based paradigm that addresses legal issues only); and it focuses on individual rather than communal interests.²

Litigation has not always been effective in resolving conflicts, due to the challenges bedevilling it.³ For instance, the existence of complex procedures and rules of evidence; high litigation costs; lack of decentralized courts; use of legal jargon; and delays caused by backlog of cases have perpetuated inaccessibility of justice, especially to the poor.⁴ Furthermore, other formal dispute resolution mechanisms, such as arbitration, are not available to criminal matters because they are not arbitrable.⁵

Traditional dispute resolution mechanisms (hereinafter referred to as TDRMs) are methods that local communities have applied in managing disputes since time immemorial, which have been passed from one generation to another.⁶ TDRMs have many advantages over the formal dispute resolution mechanisms in promoting access to justice.⁷ This is because they are cheaper, faster, less procedural, informal, flexible and less time consuming.⁸ They result in restorative justice by encouraging “win-win” situations, promoting reconciliation, pursuing

¹Olagunju O, ‘Traditional African dispute resolution (TADR) mechanisms’ (2014) <<https://www.linkedin.com/pulse/20141115083304-106263112-traditional-african-dispute-resolution-tadr-mechanisms>> on 31 January 2017.

² Olagunju O, ‘Traditional African dispute resolution (TADR) mechanisms’ (2014).

³ Muigua K, ‘Access to justice: promoting court and alternative dispute resolution strategies’ (2014), 1.

⁴ Muigua K & Kariuki F, ‘ADR, access to justice and development in Kenya’ *Strathmore Law Journal* (2014), 1.

⁵ Muigua K, ‘Emerging jurisprudence in the law of arbitration in Kenya: challenges and promises’ 6. See also: Kariuki F, ‘Redefining ‘arbitrability:’ assessment of articles 159 & 184 (4) of the Constitution of Kenya’ *Alternative Dispute Resolution Journal* (2013), 177.

⁶ Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: case study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR’ *Alternative Dispute Resolution Journal* (2014), 202.

⁷ See *Dry Associates Limited v Capital Markets Authority & another* [2012] eKLR.

⁸ Muigua K, ‘Access to justice: promoting court and alternative dispute resolution strategies’ (2014), 3.

interests rather than legal rights as well as bringing all parties on board.⁹ As such, TDRMs have increasingly been used in conflict management as an alternative to criminal litigation.¹⁰

Before the enactment of the Constitution of Kenya (2010), customary law and TDRMs were subordinated to formal laws.¹¹ Now, in exercising judicial authority, courts and tribunals are to be guided by TDRMs.¹² TDRMs are also provided for by Acts of Parliament.¹³ Moreover, TDRMs have been applied in criminal matters such as murder cases¹⁴ and manslaughter cases.¹⁵

Despite this, there are challenges that persist in the application of TDRMs in criminal matters. For instance, TDRMs merely serve as a guide to courts in exercising judicial authority,¹⁶ therefore the court may opt not to apply them, even in the most appropriate cases.¹⁷ Moreover, the hierarchical inferiority of TDRMs to formal dispute resolution mechanisms as a result of its repugnancy clause¹⁸ undermines their application. On procedural uncertainty, the point at which TDRMs will apply in criminal matters is unclear, as well as the fact that customary law is uncodified¹⁹ making it even more difficult to apply. These challenges have perpetuated inaccessibility of justice to numerous Kenyans, despite access to justice being a constitutional right.²⁰ It is against this background that the study examines TDRMs and assessed their usefulness and appropriateness in criminal matters in Kenya.

⁹ Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 211. See also Muiigua K, 'Access to justice: promoting court and alternative dispute resolution strategies' (2014), 3.

¹⁰ Kariuki F, 'Customary law jurisprudence from Kenyan Courts: Implications for traditional justice systems' (2015), 11.

¹¹ Kariuki F, 'Customary law jurisprudence from Kenyan courts: implications for traditional justice systems' 1.

¹² Article 159(2)(c), *Constitution of Kenya* (2010).

¹³ See: *Criminal Procedure Code* (Act No. 12 of 2012), *Magistrates' Court Act* (Act No. 26 of 2015), *National Cohesion and Integration Act* (Act No. 12 of 2008).

¹⁴ See: *R v Mohamed Abdow Mohamed* [2013] eKLR. See also *R v Abdulahi Noor Mohamed Alias Arab* [2016] eKLR.

¹⁵ *R v Lenaas Lenchura* [2011] eKLR.

¹⁶ Article 159(2)(c), *Constitution of Kenya* (2010).

¹⁷ Kariuki F, 'Customary law jurisprudence from Kenyan Courts: Implications for traditional justice systems' (2015), 12.

¹⁸ See section 3(2), *Judicature Act* (Act No. 10A of 2012). See also: Article 159(3), *Constitution of Kenya* (2010).

¹⁹ Kariuki F, 'Customary law jurisprudence from Kenyan Courts: Implications for traditional justice systems' (2015), 12.

²⁰ Article 48, *Constitution of Kenya* (2010).

1.2 Statement of the problem

The recognition of TDRMs is expected to address some of the challenges of accessing criminal justice. However, its recognition is only a guide to be used in exercising judicial authority.²¹ There are no laws outlining the procedure to be followed in applying TDRMs in criminal matters, including: the point in which TDRMs may be used in criminal procedure, the types of criminal matters that are in the scope of TDRMs; codification of customary laws that may be applied in TDRMs, the criteria for selecting elders and choosing cases, and so forth.²² As such, this study seeks to analyse the suitability of TDRMs in adjudication of criminal matters in light of the current legal system in Kenya.

1.3 Research objectives

The objectives of the study are to:

- i. Examine the legal framework for TDRMs in criminal matters in Kenya.
- ii. Analyse the nature of criminal matters in Kenya.
- iii. Assess the opportunities and challenges of using TDRMs in criminal matters in Kenya.
- iv. Make recommendations on the application of TDRMs in criminal matters in Kenya.

1.4 Hypothesis

TDRMs are suitable for resolving criminal matters in Kenya.

1.5 Justification of the study

The study highlights challenges that the application of TDRMs may face in the criminal justice system. For instance, TDRMs are only a guide to be used in criminal matters, and by virtue of judicial discretion, they may not be used altogether.²³ Moreover, the repugnancy clause further subordinates TDRMs in dispute resolution.²⁴ In the application of TDRMs, there are no laws outlining the procedure to be followed, including *inter alia*: the point at which TDRMs may be used in criminal procedure; the lack of codification of customary laws; the lack of a criteria for selecting cases and elders or adjudicators as well as provisions of their remuneration and so forth.²⁵ There is also the possibility of human rights violations in the application of TDRMs in criminal matters such as the violation of the right to a fair and public

²¹ Article 159(2)(c), *Constitution of Kenya* (2010).

²² Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 210-211.

²³ See article 159(2)(c), *Constitution of Kenya* (2010).

²⁴ See section 3(2), *Judicature Act* (Act No. 10A of 2012). See also: Article 159(3), *Constitution of Kenya* (2010).

²⁵ Kariuki F, 'Conflict resolution by elders in Africa: successes, challenges and opportunities' (2015), 16.

hearing by a competent, independent and impartial tribunal;²⁶ the right to counsel;²⁷ right to appeal;²⁸ protection from double jeopardy,²⁹ among others. These challenges if left unchecked may result in TDRMs being rendered ineffective and unsuitable in the future of criminal adjudication.

It is thus necessary to analyse whether TDRMs are appropriate in resolution of criminal matters in Kenya, given their application in recent criminal cases.³⁰ The question as to whether access to justice may be achieved by applying TDRMs in criminal matters in Kenya will be addressed.

1.6 Literature review

The study reviews the literature thematically. The key themes discussed are: the nature of TDRMs; TDRMs and access to criminal justice; TDRMs and human rights; challenges of using TDRMs; and the jurisprudence and legal framework of TDRMs.

1.6.1 TDRMs and access to criminal justice

Francis Kariuki explains that TDRMs promote restorative justice by encompassing “win-win” situations, pursuing interests rather than strict legal rights as well as bringing all parties on board in conflict management.³¹ For criminal justice, restorative processes enable victims to air out the impact that the crimes have had on them, while offenders understand and take responsibility for their actions and make amends.³² The main goal is to involve victims and offenders in holding the offender accountable, as well as reconciling the victim with the community.³³ *Francis Kariuki* explains that the use of TDRMs increases access to justice by “bringing justice closer to the people” as they are inexpensive, flexible and accessible.³⁴

²⁶ United Nations Human Rights Commission, ‘Human rights and traditional justice systems in Africa’, *United Nations* (2016), 48.

²⁷ United Nations Human Rights Commission, ‘Human rights and traditional justice systems in Africa’ 53.

²⁸ United Nations Human Rights Commission, ‘Human rights and traditional justice systems in Africa’ 53.

²⁹ United Nations Human Rights Commission, ‘Human rights and traditional justice systems in Africa’ 54.

³⁰ See: *R v Mohamed Abdow Mohamed* [2013] eKLR. See also *R v Abdulahi Noor Mohamed Alias Arab* [2016] eKLR.

³¹ Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 211.

³² Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 210.

³³ Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 211.

³⁴ Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 210.

Moreover, the *United Nations General Assembly* made a resolution³⁵ positing that informal mechanisms and customary justice should be used in facilitating victim redress.³⁶ In this regard, administrative and judicial processes should be strengthened to ensure that TDRMs are accessible, fair, inexpensive and expeditious.³⁷

The literature above is used in the research to assess whether TDRMs can enhance access to criminal justice in Kenya.

1.6.2 The nature of TDRMs

*Kariuki Muigua*³⁸ explains that communities in Kenya had their own conflict resolution mechanisms before the advent of colonialism including negotiation, mediation and reconciliation.³⁹ TDRMs are however not archaic as the term ‘traditional’ suggests, but are subject to change over time.⁴⁰ TDRMs are rooted in the culture of societies and incorporate concepts of mediation, restitution and assimilation.⁴¹

Muigua explains the rationale for the recognition of TDRMs in Kenya as the need to promote access to justice, to ensure expeditious resolution of disputes, as well as to respect the diverse cultures of Kenyan communities.⁴² Moreover, *Olajide Olagunju*⁴³ explains the restorative goal of TDRMs which was not to punish, but to promote unity, peace and reconciliation within the community.⁴⁴ In addition, TDRMs are cheap, fast, less procedural,

³⁵ UNGA, *Declaration of basic principles of justice for victims of crime and abuse of power*, UN A/RES/40/34 (29 November 1985).

³⁶ UNGA, *Declaration of basic principles of justice for victims of crime and abuse of power*, para 6.

³⁷ UNGA, *Declaration of basic principles of justice for victims of crime and abuse of power*, para 7.

³⁸ Muigua K, ‘Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010’ (2014).

³⁹ Muigua K, ‘Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010’ (2014) 1.

⁴⁰ Kariuki F, ‘Community, customary and traditional justice systems in Kenya: reflecting on and exploring the appropriate terminology’ *Alternative Dispute Resolution* (2007), 175.

⁴¹ Mutisi M, ‘The Abunzi mediation in Rwanda: opportunities for engaging with traditional institutions of conflict resolution’ <http://www.accord.org.za/publication/the-abunzi-mediation-in-rwanda/> on 13 September 2017.

⁴² Muigua K, ‘Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010’ (2014) 6.

⁴³ Olagunju O, ‘Traditional African dispute resolution (TADR) mechanisms’ (2014) <<https://www.linkedin.com/pulse/20141115083304-106263112-traditional-african-dispute-resolution-tadr-mechanisms>> on 31 January 2017.

⁴⁴ Olagunju O, ‘Traditional African dispute resolution (TADR) mechanisms’ (2014).

informal, flexible and less time consuming.⁴⁵ They result in restorative justice by encouraging “win-win” situations, promoting reconciliation, pursuing interests rather than legal rights as well as bringing all parties on board.⁴⁶

TDRMs are derived from customary law which are the rules applied by different ethnic groups.⁴⁷ *Kariuki Muigua* considers the link between TDRMs and customary law, by explaining that the incorporation of customary laws within the legal framework is the basis by which TDRMs are recognized, and the protection of customary law is thus imperative to the flourishing of TDRMs in Kenya.⁴⁸ *Francis Kariuki*⁴⁹ explains that TDRMs are embedded in customs of communities, the success of TDRMs being dependent on the protection of customary law. Furthermore, *PLO Lumumba and Luis Franceschi* assert that TDRMs preserve the place of customary law.⁵⁰ In relation to criminal matters, *Olagunju* explains that the application of TDRMs extends to criminal trials by means of adjudication and mediation.⁵¹

The literature above explains the nature of TDRMS, which is important in analysing the appropriateness of TDRMs in criminal matters.

1.6.3 TDRMs and human rights

William Musyoka asserts that there is an important connection between criminal law and human rights.⁵² An accused person in criminal matters has the right to a fair trial.⁵³ In considering the applicability of TDRMs in criminal matters, the *United Nations Human Rights Commission*⁵⁴ examines TDRMs in sub-Saharan Africa from a human rights perspective and with reference to international human rights treaties. This is an important publication with

⁴⁵ Muigua K, ‘Access to justice: promoting court and alternative dispute resolution strategies’ (2014), 3.

⁴⁶ Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: case study of Republic v Mohamed Abdow Mohamed [2013] eKLR’ *Alternative Dispute Resolution Journal* (2014), 211. See also Muigua K, ‘Access to justice: promoting court and alternative dispute resolution strategies’ (2014), 3.

⁴⁷ Jackson T, *The law of Kenya*, 3ed, Kenya Literature Bureau, Nairobi, 1988, 21.

⁴⁸ Muigua K, ‘Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010’ 6.

⁴⁹ Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: case study of Republic v Mohamed Abdow Mohamed [2013] eKLR’, 205.

⁵⁰ Lumumba PLO & Franceschi L, *The Constitution of Kenya, 2010: An introductory commentary*, 476.

⁵¹ See generally Olagunju O, ‘Traditional African dispute resolution (TADR) mechanisms’ (2014).

⁵² Musyoka M, *Criminal law*, 1ed, Law Africa, Nairobi, 2013, 11.

⁵³ Article 50, *Constitution of Kenya* (2010).

⁵⁴ United Nations Human Rights Commission, ‘Human rights and traditional justice systems in Africa’, *United Nations* (2016).

regards to the repugnancy clause.⁵⁵ The publication explains the possibility of human rights being violated in the application of TDRMs, including: the right to a fair and public hearing by a competent, independent and impartial tribunal;⁵⁶ the right to counsel;⁵⁷ right to appeal⁵⁸; protection against double jeopardy⁵⁹ among others. In addition, *Francis Kariuki*⁶⁰ explains that traditional courts have undermined women's rights in the perpetuation of patriarchy. However, the publication highlights that the application of TDRMs may on the other hand promote human rights through the protection of the right to be tried without undue delay⁶¹ and victim's rights.⁶²

The considerations above are important in analysing the appropriateness of TDRMs in criminal matters in Kenya.

1.6.4 Challenges facing TDRMs in criminal matters

*Francis Kariuki*⁶³ argues that the scope of TDRMs extends to criminal matters, given its recognition⁶⁴ and avers that TDRMs should be applied in criminal cases.⁶⁵ He poses questions regarding the applicability of TDRMs that are largely left unanswered. For instance, the fact that different ethnic tribes in Kenya have different conflict management systems that have not been documented; the question on whether there is a need for traditional customary courts that run parallel to the formal court system; considerations on who would head traditional courts in the event that they are implemented; and the lack of legal representation.⁶⁶ As such, the study considers these questions and whether it is worth advocating for the application of TDRMs in criminal matters in Kenya, given their challenges.

⁵⁵ Article 159(3)(a),(b) *Constitution of Kenya* (2010).

⁵⁶ United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa' 48.

⁵⁷ United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa' 53.

⁵⁸ United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa' 53.

⁵⁹ United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa' 54.

⁶⁰ Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: case study of Republic v Mohamed Abdow Mohamed [2013] eKLR', 211.

⁶¹ United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa' 54.

⁶² United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa' 54.

⁶³ Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 201-228.

⁶⁴ See article 159(2)(c), *Constitution of Kenya* (2010).

⁶⁵ Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 201.

⁶⁶ Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 208-209.

1.6.5 TDRMs jurisprudence and legal framework

*Francis Kariuki*⁶⁷ posits that there is a need for courts to develop jurisprudence that promotes TDRMs and customary law.⁶⁸ The discussion highlights the historical development of TDRM jurisprudence showing the resilience of TDRMs and customary law.⁶⁹ He highlights the instances in which the Court has applied customary law to criminal matters, for instance in cases of indecent assault⁷⁰ and common assault,⁷¹ and how these matters were resolved through compensation in accordance with customary law.⁷² He further discusses the need for proof of customary law in evidence as well as the institution of assessors in dispute resolution,⁷³ which is important in the consideration of the applicability of TDRMs in criminal cases in accordance with the current legal framework in Kenya.

However, in his discussion, there is no specific analysis of the application of TDRMs in criminal matters in light of the current legal framework in Kenya, whilst considering the challenges and opportunities faced. He posits that courts ought to develop jurisprudence in support of TDRMs and the application of customary law⁷⁴ but does not consider that additionally, the court requires a supportive legal framework.

Based on the above, this study seeks to assess the appropriateness, opportunities and challenges of using TDRMs in criminal matters in Kenya, in light of the current legal framework.

1.7 Theoretical framework

This section discusses the social solidarity theory and the optimal psychology theory as the theories supporting the use of TDRMs in dispute resolution.

⁶⁷ Kariuki F, 'Customary law jurisprudence from Kenyan courts: implications for traditional justice systems' *Kariuki Muigua & Co. Advocates* (2015).

⁶⁸ Kariuki F, 'Customary law jurisprudence from Kenyan courts: implications for traditional justice systems' 1.

⁶⁹ See generally Kariuki F, 'Customary law jurisprudence from Kenyan courts: implications for traditional justice systems'.

⁷⁰ See *Kosele African Court Criminal Case No. 33 of 1966*.

⁷¹ See *Bungoma District African Court Criminal Case No. 493 of 1967*.

⁷² Kariuki F, 'Customary law jurisprudence from Kenyan courts: implications for traditional justice systems' 4.

⁷³ Kariuki F, 'Customary law jurisprudence from Kenyan courts: implications for traditional justice systems' 8-9.

⁷⁴ Kariuki F, 'Customary law jurisprudence from Kenyan courts: implications for traditional justice systems' 1.

1.7.1 Social Solidarity Theory

The theory is propounded by Emile Durkheim,⁷⁵ who explains that solidarity entails the unity within a group that is necessary to defend themselves against opposing interests. It is a social tie that holds people together for purposes of mutual interests, each individual working for the benefit of others.⁷⁶ In modern society, social cohesion is a function of the interdependence of the components of society.⁷⁷ Extrapolating this theory to this study, dispute resolution is a social fact that society derives a benefit.⁷⁸ The restorative nature of TDRMs promotes social cohesion in the community, rehabilitation of wrongdoers as well as addressing the underlying issues in conflict.⁷⁹ This helps to explain the resilience of TDRMs because of the need to ensure effective, efficient and accessible conflict management.⁸⁰ In the instance that members of a society cannot access justice systems, an alternative should be considered, therefore TDRMs should be applied as it provides a dispute resolution utility to society.⁸¹ TDRMs would only be beneficial to the Kenyan society if its framework deals with the challenges facing the application of TDRMs in criminal matters. Furthermore, there are possibilities of human rights violations in applying TDRMs in criminal matters.⁸² These challenges if left unchecked may result in TDRMs being rendered ineffective in the future of criminal adjudication.

1.7.2 Optimal Psychology Theory

The theory asserts that life and reality are considered from a point of view of culture, such that dispute resolution will be optimally managed when it is accordance with the culture of those resolving the conflict.⁸³ It then follows that dispute resolution will be sub-optimal

⁷⁵ See generally: Durkheim E, *The division of labour in society*, Macmillan Publishers, 1ed, 1984, xi.

⁷⁶ Emile Durkheim and Social Solidarity <http://www.actforlibraries.org/emile-durkheim-and-social-solidarity/> on 25 January 2016.

⁷⁷ Emile Durkheim and Social Solidarity <http://www.actforlibraries.org/emile-durkheim-and-social-solidarity/> on 25 January 2016.

⁷⁸ Kariuki F, 'Conflict resolution by elders in Africa: successes, challenges and opportunities' (2015), 3.

⁷⁹ Kariuki F, 'Conflict resolution by elders in Africa: successes, challenges and opportunities' (2015), 3.

⁸⁰ Emile Durkheim and Social Solidarity <http://www.actforlibraries.org/emile-durkheim-and-social-solidarity/> on 25 January 2016.

⁸¹ Kariuki F, 'Conflict resolution by elders in Africa: successes, challenges and opportunities' (2015), 2-3.

⁸² See generally: United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa', *United Nations* (2016).

⁸³ See generally: Myers L, *Understanding an Afrocentric world view: introduction to an optimal psychology*, Kendall/Hunt, 2ed, 1992.

when it is done in accordance with foreign cultures.⁸⁴ Formal justice systems in Kenya are therefore sub-optimal in solving conflicts due to the difference in cultural contexts. For instance, African traditional societies were communal in nature, as opposed to the individualistic nature of western societies.⁸⁵ Moreover, the retributive and adversarial ‘winner-loser’ system characterising western formal dispute resolution does not apply to TDRMs. TDRMs are restitutive in nature and seek to ensure harmony and peaceful coexistence.⁸⁶ Because of the resilience of TDRMs alongside formal dispute resolution mechanisms, it is important to ensure that their application is made even more optimal by analysing their applicability in criminal matters, given their challenges, which the study seeks to do.

1.8 Research methodology

1.8.1 Data collection

The research is carried out through desktop research relying on primary and secondary sources of data. Primary sources of data include: laws of Kenya such as the Constitution of Kenya (2010),⁸⁷ the Judicature Act,⁸⁸ the Criminal Procedure Code⁸⁹ and other Kenyan statutes; policy documents; and international instruments that have been ratified by Kenya. These are reviewed, in order to examine the legal framework of TDRMs in Kenya. Precedence on the application of TDRMs in criminal cases is reviewed to analyse post-2010 jurisprudence on TDRMs. This will include *R v Mohammed Abdow Mohammed*,⁹⁰ *R v Abdulahi Noor Mohamed Alias Arab*,⁹¹ *R v Lenaas Lenchura*,⁹² among others. This material was accessed from online sources such as Kenya Law.⁹³ Secondary sources of data such as books and journal articles that analyse the role of TDRMs in promoting access to justice, as well as the viability of traditional justice systems with criminal matters is reviewed. This material is accessed from online sources, electronic databases and the Strathmore University Library.

⁸⁴ Kariuki F, ‘Conflict resolution by elders in Africa: successes, challenges and opportunities’ (2015), 3.

⁸⁵ See generally Olagunju O, ‘Traditional African dispute resolution (TADR) mechanisms’ (2014).

⁸⁶ Kariuki F, ‘Conflict resolution by elders in Africa: successes, challenges and opportunities’ (2015), 3.

⁸⁷ *Constitution of Kenya* (2010).

⁸⁸ *Judicature Act* (Act No. 10A of 2012).

⁸⁹ *Criminal Procedure Code* (Act No. 12 of 2012).

⁹⁰ *R v Mohamed Abdow Mohamed* [2013] eKLR.

⁹¹ *R v Abdulahi Noor Mohamed Alias Arab* [2016] eKLR.

⁹² *R v Lenaas Lenchura* [2011] eKLR.

⁹³ Kenya Law <<http://kenyalaw.org/kl/>> on 23 January 2016.

A case study is conducted as well. Firstly, the *Gacaca Courts* of Rwanda are assessed. *Gacaca Courts* used traditional communal justice mechanisms that enabled justice to be pursued in the prosecution of war crimes, genocide and crimes against humanity.⁹⁴ These courts are considered because they were institutions that applied TDRMs in resolving the above crimes, and it will be important to consider the achievements and challenges of *Gacaca Courts* in analysing the applicability of TDRMs to criminal matters in Kenya. Moreover, the *abunzi*, which are the Mediation Committees, are assessed.

1.8.2 Data analysis

The data collected is analysed in light of the statement of the problem, hypothesis and research objectives including: examining the legal framework for TDRMs in criminal matters in Kenya; analysing the nature of criminal matters in Kenya; assessing the opportunities and challenges of using TDRMs in criminal matters in Kenya and making recommendations on the application of TDRMs in criminal matters in Kenya.

1.9 Limitations of the study

The scope of the study is limited to the application of TDRMs in murder cases. This is to ensure specificity in analysing the scope of application of TDRMs in Kenya. Furthermore, due to time constraints, the study will only conduct and rely on desktop research.

1.10 Chapter breakdown

The study is constituted in 6 chapters:

Chapter One: Introduction to the study: The chapter contains the introduction and background of the study; the statement of the problem; the research objectives; the hypothesis; the justification of the study; the literature review; the theoretical framework and the research methodology.

Chapter Two: Legal Framework of TDRMs in Kenya: The chapter contains the legal framework of TDRMs in criminal matters in Kenya which shall include an analysis of: the Constitution of Kenya (2010); Acts of Parliament; case law; policy documents and international instruments ratified in Kenya.

Chapter Three: The Nature of Criminal Matters in Kenya: The chapter contains a brief discussion of the nature of criminal cases, in particular their adjudication and institutions involved in criminal dispute resolution.

⁹⁴ Kariuki F, 'Conflict resolution by elders in Africa: successes, challenges and opportunities' (2015), 3.

Chapter Four: Case study of Rwanda: The chapter contains: an analysis of the appropriateness of TDRMs in Rwanda, how traditional justice systems have been implemented in adjudicating criminal matters; and the lessons that Kenya can learn from the analysis.

Chapter Five: The Suitability of TDRMs in criminal matters in Kenya: The chapter contains an assessment of the characteristics of TDRMs, based on the discussion in Chapters 3 and 4, in order to establish the attributes that make them appropriate for the resolution of criminal disputes in Kenya.

Chapter Six: Findings, Recommendations and Conclusions: The chapter contains the findings, recommendations and conclusions of the study. The chapter will demonstrate how the research objectives have been met and whether the study hypothesis has been proved or disproved.

CHAPTER TWO

THE LEGAL MANIFESTATION OF TDRMS IN KENYA

2.1 Introduction

This chapter seeks to examine the legal footprint of TDRMs in Kenya. It comprises an analysis of legal instruments including: the Constitution of Kenya (2010); Acts of Parliament; international law; and case law. The purpose of this chapter is to examine: whether the current legal framework promotes the application of TDRMs; their scope of application; the institutions that promote TDRMs; and the shortcomings of the existing legal framework on the application of TDRMs in criminal matters.

2.1.1 International legal instruments

International treaties and conventions that have been ratified form part of the laws of Kenya by virtue of article 2(6) of the Constitution of Kenya.¹ In addition, general principles of international law form part of the laws on Kenya.² The relevant conventions are discussed below.

a) The Charter of the United Nations

Parties and individuals to a dispute may settle it by negotiation, mediation and “peaceful means of their own choice” by virtue of article 33 of the Charter of the United Nations.³ TDRMs are peaceful, restorative, community-inclusive, cheap and accessible thus they may be used in the settlement of disputes in the international sphere.

b) The Indigenous and Tribal People’s Convention

In relation to indigenous people and customary law, the Indigenous and Tribal People’s Convention⁴ provides that in applying national laws to indigenous people, due regard shall be had to their customary law.⁵ Furthermore, procedures are to be established to resolve conflicts which may arise in the application of the customary law and institutions.⁶ In addition, article 9

¹ Article 2(6), *Constitution of Kenya* (2010).

² Article 2(5), *Constitution of Kenya* (2010).

³ Article 33, *Charter of the United Nations*, 24 October 1945, 1 UNTS 24.

⁴ *Indigenous and Tribal Peoples Convention*, 27 June 1989, C169.

⁵ Article 8(1), *Indigenous and Tribal Peoples Convention*, 27 June 1989, C169.

⁶ Article 8(2), *Indigenous and Tribal Peoples Convention*, 27 June 1989, C169.

provides that customary methods of dealing with offences (TDRMs), if consistent with national law, are to be respected⁷ and taken into consideration by the relevant authorities and courts.⁸

The above shows that customary law and similar institutions are to be protected. TDRMs are embedded in the customs of communities, and the success of TDRMs is dependent on the protection of customary law.⁹

c) The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

With regards to culture, UNDRIP¹⁰ provides that indigenous peoples have the right to maintain, control, protect and develop their cultural heritage as well as the manifestations of their culture.¹¹ Specifically, indigenous peoples have the right to maintain and strengthen their distinct legal, social, economic and cultural institutions.¹² Despite the non-binding nature of UNDRIP, the importance of such institutions (TDRMs) should not be ignored.

d) International Covenant on Economic, Social and Cultural Rights (ICESCR)

The recognition of culture is also in line with the ICESCR where article 15 provides that State Parties are to recognize the right of everyone to take part in cultural life including those necessary for the conservation, development and diffusion of culture.¹³ The General Comment on the same provides that everyone includes individuals, in association with others or within a community.¹⁴ TDRMs are thus appropriate as they are community inclusive and are cultural institutions.¹⁵ The protection of culture is therefore important towards the protection of TDRMs.

e) International Covenant on Civil and Political Rights (ICCPR)

In relation to indigenous people, the ICCPR provides at article 27 that for States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with others to enjoy their culture and to use their language.¹⁶ Such minorities include indigenous people, who are in existence in Kenya today.

⁷ Article 9, *Indigenous and Tribal Peoples Convention*, 27 June 1989, C169.

⁸ Article 10, *Indigenous and Tribal Peoples Convention*, 27 June 1989, C169.

⁹ Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 205.

¹⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295.

¹¹ Article 31, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295.

¹² Article 5, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295.

¹³ Article 15, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3.

¹⁴ *General comment no. 21, Article 15, Right of everyone to take part in cultural life*, 21 December 2009.

¹⁵ Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 202.

¹⁶ Article 27, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

In addition, Article 14, provides for the right to a fair trial.¹⁷ General Comment No. 32¹⁸ on the right to a fair trial states that the article is relevant in cases that States have recognized courts based on customary law, that use TDRMs, as the right to a fair trial ought to be respected.¹⁹

f) African Charter on Human and Peoples' Rights (ACHmPR)

In the African context, the ACHmPR at article 17 provides that every individual may freely take part in the cultural life of his community²⁰ and that the promotion and protection of morals and traditional values recognized by the community is the duty of the State.²¹ This right was recognized in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*²² in which the Endorois people of Kenya were denied access to Lake Bogoria and forced to live on semi-arid lands without access to vital resources for their livestock. The denial of their ancestral land denied the Endorois people access to an integrated system of beliefs, values, norms, morals, and traditions linked to the Lake. It was the view of the Commission that the essence of the Endorois' right to culture had been denied, rendering the right illusory.

g) Rio Declaration on Environment and Development

With regard to the protection of the environment, Principle 22 of the Rio Declaration,²³ provides that indigenous people and their communities, and other local communities, have a vital role in environmental management because of their knowledge and traditional practices. Despite the non-binding nature of this instrument, states should recognize and duly support

¹⁷ Article 14, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

¹⁸ *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007. See also: United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa', 44.

¹⁹ United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa', 44.

²⁰ Article 17(2), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3.

²¹ Article 17(3), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3.

²² *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, ACmHPR Comm 276/03.

²³ *Rio Declaration on Environment and Development*, 14 June 1992.

their identity, culture and interests and enable their effective participation in the achievement of sustainable development.²⁴

2.1.2 The Kenyan legal framework

a) Constitution of Kenya 2010

i. The recognition of TDRMs in Kenya

Courts and tribunals are to promote the use of TDRMs according to article 159(2)(c) of the Constitution.²⁵ This provision contributes to the realization of constitutional enshrinements including: justice shall not be administered without undue regard to procedural technicalities,²⁶ and that justice shall not be delayed.²⁷

Courts have continued to recognize TDRMs. The High Court case of *Raphael Lukale v Elizabeth Mayabi & another*²⁸ was a family dispute pitting a mother and her lover on one side and the children with the deceased's husband on the other. The dispute raised social and cultural issues with legal bearing such as inheritance of property and wives, and children rights. The court held that the issues should be first dealt with at the clan level through reconciliation and TDRMs. Even though there is a lack of authorities on the operation of Luhya dispute resolution mechanisms, the Court was of the opinion that they exist and that the family should be given an opportunity to explore them before proceeding with the court process.

Moreover, unlike the Judicature Act²⁹ and the Magistrate's Courts Act,³⁰ (discussed below) article 159(2) does not limit the application of TDRMs to civil matters only, but may be applied in criminal matters.³¹ In *Republic v Mohamed Abdow Mohamed*³² the accused was charged with murder, which charge was withdrawn on account of a settlement between the families of the accused and the deceased. The settlement was based on "blood money" of offering domestic animals as compensation for the deceased's life. The court allowed the settlement as it would

²⁴ Principle 22, *Rio Declaration on Environment and Development*, 14 June 1992.

²⁵ Article 159(2)(c), *Constitution of Kenya* (2010).

²⁶ Article 159(2)(d), *Constitution of Kenya* (2010).

²⁷ Article 159(2)(b), *Constitution of Kenya* (2010).

²⁸ *Raphael Lukale v Elizabeth Mayabi & another* [2016] eKLR.

²⁹ Section 3(2), *Judicature Act* (Act No. 10A of 2012).

³⁰ Section 2, *Magistrates' Court Act* (Act No. 26 of 2015).

³¹ Kariuki F, 'Redefining Arbitrability: Assessment of Articles 159 & 189(4) of the Constitution of Kenya' *Alternative Dispute Resolution Journal* (2013), 174-188. See also: Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 211.

³² *Republic v Mohamed Abdow Mohamed* [2013] eKLR.

meet the ends of justice. In this case, the mandate of deciding whether the ends of justice would be met is under courts and tribunals, which are expensive, procedural, adversarial and are retributive, rather than restitutive. Due to these challenges, it is opined that the court is not in the appropriate position to apply TDRMs in promoting access to justice.³³

The Constitution at article 159(3) provides that TDRMs are not to be used in a way that: contravenes the Bill of Rights; is repugnant to justice and morality; or is inconsistent with the Constitution or any other written law.³⁴ This provision constrains the application of TDRMs.³⁵ Firstly, the Constitution nor statutes define what is considered to be repugnant to justice and morality. This *lacuna* provides an opportunity for the courts to restrict the application of TDRMs.³⁶ For instance, in the case of *Dancan Ouma Ojenge v P.N. Mashru Limited*³⁷ the use of witchcraft (trial by ordeal) by the employer in conducting investigations regarding the loss of property in a workplace dispute was found to be repugnant to justice and morality, inconsistent with the Constitution and written law as it violated the claimant's right to fair labour practices.³⁸ Moreover, the provision weakens the attribute of TDRMs as they are viewed as being inferior, because they are subject to other laws.

ii. Customary Law and TDRMs

Customary law that is inconsistent with the Constitution is void to the extent of the inconsistency according to article 2(4).³⁹ This provision affirms that the Constitution is the supreme law, ranking above all customs.⁴⁰ It is the opinion of some writers that this provision is detrimental to the place of customary law and the provision is described as a 'negative perspective'⁴¹ as it does not uplift the place of customary law juridically.⁴² This has the effect

³³ Ng'etich R, 'Resolving community land disputes using traditional justice systems in Kenya' Published LLB Thesis, Strathmore Law School, January 2016, 15.

³⁴ Article 159(3), *Constitution of Kenya* (2010).

³⁵ Lumumba PLO & Franceschi L, *The Constitution of Kenya, 2010: An introductory commentary*, 476.

³⁶ Ng'etich R, 'Resolving community land disputes using traditional justice systems in Kenya' Published LLB Thesis, Strathmore Law School, January 2016, 15.

³⁷ *Dancan Ouma Ojenge v P.N. Mashru Limited* [2017] eKLR.

³⁸ *Dancan Ouma Ojenge v P.N. Mashru Limited* [2017] eKLR.

³⁹ Article 2(4), *Constitution of Kenya* (2010).

⁴⁰ Mbondenyei M & Ambani J, *The new constitutional law of Kenya: Principles, governance & human rights*, Claripress Ltd, Nairobi, 2012, 41.

⁴¹ Lumumba PLO & Franceschi L, *The Constitution of Kenya, 2010: An introductory commentary*, 71.

⁴² Ng'etich R, 'Resolving community land disputes using traditional justice systems in Kenya' Published LLB Thesis, Strathmore Law School, January 2016, 13.

of curtailing the application of TDRMs in Kenya, as TDRMs are embedded in the practices, customs and traditions of communities, such that the success of the application of TDRMs is largely dependent of the recognition and protection of customary law.⁴³

iii. Culture and TDRMs

Culture is recognized as the foundation of the nation at Article 11(1) of the Constitution of Kenya.⁴⁴ The independence Constitution did not recognize culture,⁴⁵ and its inclusion in the 2010 Constitution is a positive step towards the application of TDRMs in Kenya because TDRMs are embedded in the values, norms and customs of traditional African cultures.⁴⁶

Culture is embedded in various aspects of society such as dispute resolution therefore imposing burdensome laws or rules on culture undermines its enduring aspects.⁴⁷ The recognition of culture in the Constitution and numerous international conventions is fundamental to its protection as well as the protection of the place and application of TDRMs.⁴⁸

iv. TDRMs and Access to Justice

The State is to ensure access to justice for all persons according to article 48.⁴⁹ Access to justice includes an enshrinement of rights and principles⁵⁰ including the availability of expeditious, just, affordable and efficient resolution of disputes,⁵¹ the use of informal dispute resolution mechanisms,⁵² and the removal of hindrances in the formal processes.⁵³

TDRMs promote restorative justice by encompassing “win-win” situations, pursuing interests rather than strict legal rights and bringing all parties on board in conflict management.⁵⁴ For criminal justice, restorative processes enable victims to air out the impact that the crimes have had on them, while offenders understand and take responsibility for their

⁴³ Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 211.

⁴⁴ Article 11(1), *Constitution of Kenya* (2010).

⁴⁵ Constitution of Kenya Review Commission, *Final draft*, 2005, 55 – 56.

⁴⁶ Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 203.

⁴⁷ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, ACmHPR Comm 276/03, 250.

⁴⁸ Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 203.

⁴⁹ Article 48, *Constitution of Kenya* (2010).

⁵⁰ See *Dry Associates Limited v Capital Markets Authority & another* [2012] eKLR.

⁵¹ Ladan, ‘Access to justice as a human right under the ECOWAS community law’ (Commonwealth Regional Conference, Abuja, April 2010).

⁵² Global Alliance Against Traffic in Women (GAATW) <<http://www.gaatw.org/atj/>> on 23 April 2017.

⁵³ Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 210.

⁵⁴ Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 211.

actions and make amends.⁵⁵ The main goal is to involve victims and offenders in holding the offender accountable, as well as reconciling the victim with the community.⁵⁶ The application of TDRMs therefore promotes access to justice which is a constitutional guarantee.

v. Interpretation of the Constitution and TDRMs

The Constitution ought to be interpreted in a manner that advances human rights and fundamental freedoms in the Bill of Rights according to Article 259(1).⁵⁷ By applying TDRMs, freedoms and rights such as access to justice are promoted. In addition, the Constitution is to be interpreted in a manner that leads to the development of the law.⁵⁸ The above provision promotes further the application of TDRMs in criminal matters as the law should be developed in a manner that promotes justice, which TDRMs seek to do.

b) Judicature Act

In light of the place of customary law as discussed above, section 3(2) of the Judicature Act⁵⁹ states that, “*The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it... so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law...*”⁶⁰ This study has emphasized on the fact that the protection and promotion of customary law is instrumental in the protection, promotion and application of TDRMs in the resolution of disputes in Kenya and as a result, section 3(2) hampers the applicability of TDRMs in Kenya, by limiting its application to civil matters only.

c) Magistrates’ Court Act

A magistrate’s court has jurisdiction in civil proceedings under African customary law for marriage, divorce, maintenance or dowry disputes, land held under customary tenure, among others.⁶¹ The same does not apply to criminal matters, thereby limiting the application of TDRMs in criminal matters in Kenya.

⁵⁵ Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 210.

⁵⁶ Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 211.

⁵⁷ Article 259(1)(b), *Constitution of Kenya* (2010).

⁵⁸ Article 259(1)(c), *Constitution of Kenya* (2010).

⁵⁹ Section 3(2), *Judicature Act* (Act No. 10A of 2012).

⁶⁰ Section 3(2), *Judicature Act* (Act No. 10A of 2012).

⁶¹ Section 7(3), *Magistrates’ Court Act* (Act No. 26 of 2015).

2.1.3 The application of TDRMs in civil matters

a) Land and Environment

In land matters, the National Land Commission is mandated by the Constitution at article 67(2)(f) to use traditional dispute resolution in resolving land conflicts.⁶² It is also a principle of land policy for communities to settle land disputes through recognized local community initiatives that are consistent with the Constitution.⁶³ Additionally, the Environment and Land Court Act⁶⁴ at section 18(c) provides that the Environment and Land Court is to be guided by the principles of judicial authority under Article 159 of the Constitution, which provides for the application of TDRMs.⁶⁵ To exemplify the above, in the case of *Lubaru M'Imanyara v Daniel Murungi*,⁶⁶ a consent reached by the parties to the case seeking to have the land dispute referred to the *Njuri Ncheke* was adopted as an order of the court.⁶⁷ Section 20 of the Environment and Land Court Act further allows the Court to adopt and implement on its own motion traditional dispute resolution mechanisms, subject to Article 159(2)(c) of the Constitution, with the agreement or at the request of the parties.⁶⁸

b) Matrimonial Dispute Resolution

Parties in a customary marriage may use customary dispute resolution before the court determines a petition for the dissolution of marriage according to section 68 of the Marriage Act.⁶⁹ Traditional dispute resolution here means customary dispute resolution.⁷⁰ For civil marriages, the court may refer a matrimonial dispute to a conciliatory process agreed between the parties.⁷¹

c) Labour and Employment

In *Dancan Ouma Ojenge v P.N. Mashru Limited*⁷² the court recognized TDRMs. However, the Court held that the use of witchcraft by the employer in conducting investigations workplace

⁶² Article 67(2)(f), *Constitution of Kenya* (2010).

⁶³ Article 60, *Constitution of Kenya* (2010).

⁶⁴ *Environment and Land Court Act* (Act No. 19 of 2011).

⁶⁵ Section 18(c), *Environment and Land Court Act* (Act No. 19 of 2011).

⁶⁶ *Lubaru M'Imanyara v Daniel Murungi* [2013] eKLR.

⁶⁷ *Lubaru M'Imanyara v Daniel Murungi* [2013] eKLR.

⁶⁸ Section 20, *Environment and Land Court Act* (Act No. 19 of 2011).

⁶⁹ Section 68 (1), *Marriage Act* (Act No. 4 of 2014).

⁷⁰ Section 68 (3), *Marriage Act* (Act No. 4 of 2014).

⁷¹ Section 66 (4), *Marriage Act* (Act No. 4 of 2014).

⁷² *Dancan Ouma Ojenge v P.N. Mashru Limited* [2017] eKLR.

dispute was repugnant to justice and morality as well as inconsistent with the Constitution and written law as it violated the claimant's right to fair labour practices.⁷³

d) Conclusion

The above instances of the application of TDRMs in different civil matters shows that TDRMs can be used in the resolution of disputes as long as they meet the Article 159 checklist.

2.1.4 TDRMs in intergovernmental matters

The Intergovernmental Relations Act at article 31 provides that the national and county governments shall take reasonable measures to resolve disputes amicably and apply and exhaust the mechanisms for alternative dispute resolution before resorting to judicial proceedings.⁷⁴ With regards to the Meru and Isiolo dispute that has caused insecurity in the region, the *Njuri Ncheke*, called on the county governments to solve the emerging conflicts in the region.⁷⁵ The *Njuri Ncheke* is the Ameru Council of Elders that uses traditional dispute mechanisms.⁷⁶

2.1.5 The application of TDRMs in criminal matters

The Criminal Procedure Code⁷⁷ at section 176 states that “...*the Court may promote reconciliation and encourage... the settlement in an amicable way of proceedings for common assault, for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may...order the proceedings to be stayed or terminated.*”⁷⁸TDRMs may be used in the settlement of common assault and offences of a personal/private nature, as long as it is not aggravated or a felony.

In *R v Lenaas Lenchura*⁷⁹ the accused was charged with murder, which was reduced to manslaughter, on a dispute regarding who would fetch water first. The accused pled guilty to manslaughter and the judge sentenced the accused to 5 years suspended sentence and to pay compensation of one female camel to the family of the deceased in accordance with their customs. The judge in making his judgment took into consideration: the fact that water was a

⁷³ *Dancan Ouma Ojenge v P.N. Mashru Limited* [2017] eKLR.

⁷⁴ Section 31, *Intergovernmental Relations Act* (Act No. 2 of 2012).

⁷⁵<<https://citizentv.co.ke/news/political-leaders-accused-of-fuelling-conflict-in-meru-103767/>> on 24 November 2017.

⁷⁶ Kariuki F, ‘African traditional justice systems’, 5.

⁷⁷ *Criminal Procedure Code* (Act No. 12 of 2012).

⁷⁸ Section 176, *Criminal Procedure Code* (Act No. 12 of 2012).

⁷⁹ *R v Lenaas Lenchura* [2011] eKLR.

scarce and important resource in Samburu; the advanced age of the accused as he was 89 years old at the time of the fight; that the accused was a first offender; and the customary law of the family of the deceased. The application of customary compensation as exemplified in the cases above revert to the pre-1967 period in which the same was used in place of sentencing the accused.⁸⁰

On the contrary, in *Republic v Abdulahi Noor Mohamed (alias Arab)*⁸¹ the accused, who was charged with murder, applied to the court to give him time to reconcile with the deceased's family and settle the matter out of court. The court however ruled that because murder is a felony, section 176 would not apply and as such TDRMs could not be used.

In accordance with *R v Lenaas Lenchura* above, in *Republic v Juliana Mwikali Kiteme & 3 others*⁸² the accused were charged with murder, released on bond but were held in custody due to poverty. The prosecutor informed the court that conciliation was possible, after receiving information from the local elder. Affidavits of the brother and mother of the deceased had been filed to the effect that traditional compensation in the form of livestock had been paid in line with the Kamba customs and traditions. The court was of the opinion that the court should promote reconciliation as envisaged in the Constitution.⁸³

Additionally, the National Cohesion and Integration Act⁸⁴ establishes the National Cohesion and Integration Commission, which has the mandate of promoting *inter alia*, harmony and peaceful coexistence between the different ethnic and racial communities of Kenya.⁸⁵ The Commission is to promote conciliation, mediation and similar forms of dispute resolution mechanisms to enhance ethnic and racial peace and harmony.⁸⁶ The Act establishes offences such as hate speech, which is a felony.⁸⁷ By virtue of this provision, TDRMs may be used in securing and enhancing ethnic and racial harmony and peace as TDRMs are restorative and involves the community in dispute resolution.

Based on the above, there are conflicting decisions regarding whether TDRMs should be applied in capital offences such as murder as evidenced in contrasting decisions of *Republic v*

⁸⁰ Kariuki F, 'Customary law jurisprudence from Kenyan Courts: Implications for traditional justice systems', 12.

⁸¹ *Republic v Abdulahi Noor Mohamed (alias Arab)* [2016] eKLR.

⁸² *Republic v Juliana Mwikali Kiteme & 3 others* [2017] eKLR.

⁸³ *Republic v Juliana Mwikali Kiteme & 3 others* [2017] eKLR.

⁸⁴ *National Cohesion and Integration Act* (Act No. 12 of 2008).

⁸⁵ Section 25(1), *National Cohesion and Integration Act* (Act No. 12 of 2008).

⁸⁶ Section 25(2)(g), *National Cohesion and Integration Act* (Act No. 12 of 2008).

⁸⁷ Section 13, *National Cohesion and Integration Act* (Act No. 12 of 2008).

Abdulahi Noor Mohamed (alias Arab) and *R v Lenaas Lenchura* in relation to section 176 of the Criminal Procedure Code on the one hand; and *Republic v Mohamed Abdow Mohamed* and *Republic v Juliana Mwikali Kiteme & 3 others* in relation to Article 159 on the other hand. It would seem however that the most recent decision of *Republic v Juliana Mwikali Kiteme & 3 others* sets a positive trajectory in the application of TDRMs in murder cases, which decision is in tandem with Article 159(2)(c) of the Constitution of Kenya (2010).

2.1.6 The right to a fair hearing and the rights of arrested persons

Every person has the right to a fair hearing⁸⁸ which includes *inter alia* the right to an independent and impartial tribunal,⁸⁹ to be represented by an advocate;⁹⁰ and to appeal or review.⁹¹ Additionally, the ICCPR provides at article 14 for the right to a fair trial.⁹²

As previously discussed, the application of TDRMs is limited to the extent that they do not contravene the Bill of Rights.⁹³ Moreover, in General Comment No. 32⁹⁴ on the right to equality before courts and tribunal and to a fair trial, the Human Rights Committee states that article 14 of the ICCPR is relevant in cases that States have recognized courts based on customary law to carry out judicial tasks.⁹⁵

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa⁹⁶ further provides that the traditional courts are not exempt from the provisions of a fair trial as provided by the African Charter on Human and People's Rights.⁹⁷ This right is provided at article 7 of the African Charter.

⁸⁸ Article 50, *Constitution of Kenya* (2010).

⁸⁹ Article 50(1), *Constitution of Kenya* (2010).

⁹⁰ Article 50(2)(g), *Constitution of Kenya* (2010).

⁹¹ Article 50(2)(q), *Constitution of Kenya* (2010).

⁹² Article 14, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

⁹³ Article 159(3)(a), *Constitution of Kenya* (2010).

⁹⁴ *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007. See also: United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa', 44.

⁹⁵ United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa', 44.

⁹⁶ *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003.

⁹⁷ *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003.

In addition, an arrested person in Kenya has rights enshrined in the Constitution.⁹⁸ Some of these rights include: the right to communicate with an advocate;⁹⁹ the right to be released on bond or bail;¹⁰⁰ and the right to be brought before a court as soon as reasonably possible.¹⁰¹

Evidently, the right to a fair trial is to be respected and in Kenya, to the extent that the right to a fair trial cannot be limited as it is an absolute right.¹⁰² The use of TDRMs in adjudicating criminal cases will therefore need to respect the right to a fair trial accorded to any accused person.

2.1.7 The rights of the victim

A victim has the right to restorative justice, as provided by section 15 of the Victim Protection Act¹⁰³ which is an Act that is aimed at *inter alia* providing protection of victims of crime; providing them with better information on the trial as well as reparation and compensation.¹⁰⁴ Restorative justice is defined as the promotion of reconciliation, restitution and responsibility through the involvement of the offender, the victim, their parents and the community in order to heal the injuries caused by the offence.¹⁰⁵ In addition, a victim has the right to present a victim impact statement in order for the court to consider the protection and welfare of the victim.¹⁰⁶

Reconciliation and restoration of justice have become an important aspect in criminal matters today and the application of TDRMs in criminal matters would be in support of the aims contained in the Act.

2.2 Conclusion

The manifestation of TDRMs in Kenya both promotes and curtails its application in criminal matters in Kenya, as explained by the individual provisions highlighted above. The international conventions promote the use of TDRMs. The Kenyan repugnancy clause, limits the application of TDRMs as provided for by article 159 of the Constitution as well as the Judicature Act. There is conflicting jurisprudence as TDRMs were upheld in *Republic v*

⁹⁸ Article 49, *Constitution of Kenya* (2010).

⁹⁹ Article 49(1)(c), *Constitution of Kenya* (2010).

¹⁰⁰ Article 49(1)(h), *Constitution of Kenya* (2010).

¹⁰¹ Article 49(1)(f), *Constitution of Kenya* (2010).

¹⁰² Article 25(c), *Constitution of Kenya* (2010).

¹⁰³ *Victim Protection Act* (Act No. 17 of 2014).

¹⁰⁴ Preamble, *Victim Protection Act* (Act No. 17 of 2014).

¹⁰⁵ Section 2, *Victim Protection Act* (Act No. 17 of 2014).

¹⁰⁶ Section 12(3), *Victim Protection Act* (Act No. 17 of 2014).

Mohamed Abdow Mohamed but not in *Republic v Abdulahi Noor Mohamed (alias Arab)* despite both cases being murder charges. The challenges presented by the legal manifestation of TDRMs in Kenya do indeed hamper the application of TDRMs in criminal matters. There is however hope for its application in the future, given the fact that TDRMs are provided for by the Constitution and the latest jurisprudence promoting their use.

CHAPTER THREE

THE NATURE OF CRIMINAL MATTERS IN KENYA

3.1 Introduction

This chapter provides a brief analysis of the nature of criminal matters in Kenya including: the institutions involved; the legal framework; the rights of the victim and accused; and the retributive nature of criminal matters; in order to assess the appropriateness of TDRMs in resolving criminal cases in Kenya.

3.2 Criminal matters and the State

Criminal matters are generally vested and undertaken by the State.¹ This is because criminal matters are of public interest, as distinguished from civil matters that are in the interest of the individual(s) concerned.² Crime affects the general public therefore the State intervenes to secure the public interest and to protect the public.³ As a result, prosecutions are brought by the State against a person(s) charged with an offence.⁴ It is however possible for individuals to institute criminal proceedings under certain circumstances.⁵

3.3 Legal framework of criminal matters in Kenya

The Penal Code⁶ provides for the criminal law in Kenya,⁷ while the Criminal Procedure Code (CPC)⁸ provides for the procedure to be followed in criminal cases, specifically for litigation.⁹ The CPC at section 176 provides for the use of reconciliation in the case of misdemeanours that are not aggravated in degree.¹⁰ In *Republic v Abdulahi Noor Mohamed*

¹ Kenya Legal Resources, 'Nature of criminal proceedings'

<<http://www.kenyalawresourcecenter.org/2011/07/nature-of-criminal-proceedings.html>> on 6 September 2017.

² Kenya Legal Resources, 'Nature of criminal proceedings'

<<http://www.kenyalawresourcecenter.org/2011/07/nature-of-criminal-proceedings.html>> on 6 September 2017.

³ Musyoka M, *Criminal law*, 1ed, Law Africa, Nairobi, 2013, 3.

⁴ 'Criminal law and procedure'

<http://www.vanuatu.usp.ac.fj/courses/la205_criminal_law_and_procedure_1/LA205_Topic1.html#1.7.5> on 6 September 2017.

⁵ Article 28, *The Office of the Director of Public Prosecutions Act* (Act No. 2 of 2013).

⁶ *Penal Code* (Cap 63).

⁷ Preamble, *Penal Code* (Cap 63).

⁸ *Criminal Procedure Code* (Act No. 27 of 2015).

⁹ Preamble, *Criminal Procedure Code* (Act No. 27 of 2015).

¹⁰ Section 176, *Criminal Procedure Code*, (Act No. 27 of 2015).

(*alias Arab*)¹¹ the accused, who was charged with murder, applied to the court to give him time to reconcile with the deceased's family and settle the matter out of court. The court however ruled that because murder is a felony, section 176 would not apply and as such TDRMs could not be used.

Moreover, section 137A of the CPC provides for plea agreement negotiation between the prosecutor and the accused in respect of reduction or withdrawal of a charge.¹² This may take the form of restitution or compensation.¹³ TDRMs may be used for such negotiations.

3.4 Institutional framework of criminal proceedings

Criminal matters are adjudicated by the courts, with the High Court having unlimited original jurisdiction over criminal matters,¹⁴ and the Magistrate Court having criminal jurisdiction and powers as conferred on it by the Criminal Procedure Code or any other written law.¹⁵ The Court of Appeal and Supreme Court may have appellate jurisdiction in the appropriate cases.¹⁶

The Director of Public Prosecutions (DPP) has the power to institute and undertake criminal proceedings against any person before any court in respect of any alleged offence.¹⁷ The DPP may also discontinue criminal proceedings at any stage before judgment is delivered.¹⁸ In *Republic v Mohamed Abdow Mohamed*¹⁹ the accused was charged with murder, which charge was withdrawn on account of a settlement between the families of the accused and the deceased. The DPP gave instructions for an oral application to be made to have the matter marked as settled. The court recognized the power of the DPP to discontinue criminal proceedings and allowed the application.

With regards to the investigation of crime, the DPP may direct the Inspector-General of the National Police Service to investigate any information of criminal conduct.²⁰ The Kenya

¹¹ *Republic v Abdulahi Noor Mohamed (alias Arab)* [2016] eKLR.

¹² Section 137A(1), *Criminal Procedure Code* (Act No. 27 of 2015).

¹³ Section 137A(2), *Criminal Procedure Code* (Act No. 27 of 2015).

¹⁴ Article 165(3)(a), *Constitution of Kenya* (2010).

¹⁵ Section 6, *Magistrates' Court Act* (Act No. 26 of 2015).

¹⁶ See Articles 163 and 164 *Constitution of Kenya* (2010).

¹⁷ Article 157(6)(a), *Constitution of Kenya* (2010).

¹⁸ Article 157(6)(b), *Constitution of Kenya* (2010).

¹⁹ *Republic v Mohamed Abdow Mohamed* [2013] eKLR.

²⁰ Article 157(4), *Constitution of Kenya* (2010).

Police Service as provided by the National Police Service Act²¹ has the mandate to *inter alia* investigate crimes, apprehend offenders, collect criminal intelligence and prevent and detect crime.²² The Administration Police Service has the mandate to apprehend offenders and to collect criminal intelligence.²³ The Directorate of Criminal Investigations in addition, has the function to undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber-crime among others.²⁴

3.5 The retributive nature of criminal adjudication

The main characteristic of criminal law is punishment, which is a form of retribution against the offender meant to show the offender the error of his ways and to promote deterrence.²⁵ Such punishment includes *inter alia* fines, death and imprisonment.²⁶ As opposed to civil law, criminal law usually does not offer compensation, rehabilitation nor community participation.²⁷

Retribution is aimed at restoring the legal balance that has been upset by the commission of a crime and is the essential characteristic of punishment.²⁸ It also promotes deterrence in order to ensure the stability of society.²⁹

3.6 Conclusion

Criminal matters are vested in the state, are retributive and embedded in the formal justice system within the institution of courts, the police and the DPP. There are similarities in support of and differences against the use of TDRMs. TDRMs are handled by the respective community, are restorative, rehabilitative and are embedded in customary law. The above is useful for the analysis of the appropriateness of TDRMs in criminal matters in Kenya handled in Chapter 5.

²¹ *National Police Service Act* (Act No. 11A of 2011).

²² Article 24, *National Police Service Act* (Act No. 11A of 2011).

²³ Article 27, *National Police Service Act* (Act No. 11A of 2011).

²⁴ Article 35, *National Police Service Act* (Act No. 11A of 2011).

²⁵ Musyoka M, *Criminal law*, 1ed, Law Africa, Nairobi, 2013, 5.

²⁶ See generally: Musyoka M, *Criminal law*, 1ed, Law Africa, Nairobi, 2013.

²⁷ Musyoka M, *Criminal law*, 1ed, Law Africa, Nairobi, 2013, 7.

²⁸ Kenya Laws Online, <<http://kenyalawsonline.blogspot.co.ke/2013/06/kenya-criminal-law.html>> on 11 September 2017.

²⁹ Kenya Laws Online <<http://www.kenyalawresourcecenter.org/2011/07/sentencing.html>> on 29 November 2017.

CHAPTER FOUR

CASE STUDY OF RWANDA

4.1 Introduction

This chapter seeks to examine the application of TDRMs in criminal matters in Rwanda, particularly, the *Gacaca* Courts and the *Abunzi* in order to analyse lessons that Kenya can learn. In examining this, Constitutions, Acts of Parliament, journal articles and policy documents shall be analysed.

4.1.1 *Gacaca* courts

4.1.1.1 The Old *Gacaca* Courts

The “old” (traditional) *gacaca* courts have been in place in Rwanda since the 15th Century, where elders, leaders and individuals gathered to resolve and discuss disputes between families and members of the community.¹ Due to colonialism, the western justice system prevailed and the *gacaca* courts were weakened. Eventually, the *gacaca* courts were used in small villages for domestic conflicts, petty crimes, to restore order and community harmony.²

4.1.1.2 The New *Gacaca* Courts

The “new” *gacaca* courts were established in Rwanda after the Rwandan Genocide, to prosecute and try perpetrators in relation and in connection with the genocide.³ These were based on the “old” *gacaca* courts, which were reset to fit with the new objectives.⁴ The new *gacaca* courts were instituted to: accelerate trials as the (formal) courts lacked capacity to deal with the large number of accused;⁵ and to reconcile Rwandans while promoting unity.⁶ *Gacaca* courts were necessary because prisons were beyond their capacity, and expedient trials were required to deal with the problem.⁷

¹ <<http://gacaca.rw/about/history-3/>> on 30 November 2017.

² United Nations Human Rights Commission, ‘Human rights and traditional justice systems in Africa’, 37.

³ United Nations Human Rights Commission, ‘Human rights and traditional justice systems in Africa’, 36.

⁴ <<http://gacaca.rw/about/history-3/>> on 30 November 2017

⁵ United Nations Human Rights Commission, ‘Human rights and traditional justice systems in Africa’, 36.

⁶ Husye L, Salter M, ‘Traditional justice and reconciliation after violent conflict’ *International Institute for Democracy and Electoral Assistance* (2008), 38.

⁷ De Brouwer A, Ruwebana E, ‘The legacy of the *gacaca* courts in Rwanda’ *International Criminal Law Review*, (2013), 938.

The aim of the new *gacaca* courts was to *inter alia*, reconcile Rwandans and promote unity, address impunity and to prove that Rwandans could settle their disputes through a system of justice based on the customs of the people.⁸

The *gacaca* courts were constituted in accordance with *Gacaca Law*⁹, which divided crime into three categories: firstly, crimes under the exclusive jurisdiction of the International Criminal Tribunal for Rwanda (ICTR) and national courts for the genocide planners and those who held positions of authority; secondly, murder and grievous bodily harm; and thirdly, property crimes.¹⁰ The courts were divided into two levels: the cell level that handled the third category of cases; and the *sectuer* level that heard the second category of cases.¹¹ *Gacaca* courts were coordinated by the National Service of *Gacaca* Jurisdiction under the Ministry of Justice.¹²

The *gacaca* courts dealt with crimes related to genocide, murder, rape, torture and property crimes such as looting, killing cattle and destroying houses.¹³ In addition, they were to promote reconciliation as inspired by the old *gacaca* courts, but had more powers.¹⁴

Gacaca courts were adapted to use both customary and formal law.¹⁵ Trials were held in the communities where the perpetrators lived, therefore there was ease of access to the courts.¹⁶ They were also established in every administrative unit in the society, which decentralized

⁸ Husye L, Salter M, 'Traditional justice and reconciliation after violent conflict' *International Institute for Democracy and Electoral Assistance* (2008), 38.

⁹ *Organic Law n°16/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts*.

¹⁰ Powers S, 'Rwanda's *gacaca* courts: implications for international criminal law and transitional justice' *American Society of International Law* (2011), 1.

¹¹ Article 3, *Organic Law n°16/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts*.

¹² Powers S, 'Rwanda's *gacaca* courts: implications for international criminal law and transitional justice' *American Society of International Law* (2011), 2.

¹³ Article 51, *Organic Law n°16/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of The Crime of, Genocide and Other, Crimes Against Humanity, Committed Between October 1, 1990 And December 31, 1994*.

¹⁴ De Brouwer A, Ruvebana E, 'The legacy of the *gacaca* courts in Rwanda' *International Criminal Law Review* (2013), 938.

¹⁵ De Brouwer A, Ruvebana E, 'The legacy of the *gacaca* courts in Rwanda' *International Criminal Law Review* (2013), 940.

¹⁶ Powers S, 'Rwanda's *gacaca* courts: implications for international criminal law and transitional justice' *American Society of International Law* (2011), 2.

justice in Rwanda.¹⁷ The community could participate in the proceedings as they were conducted openly, and some citizens were able to serve as witnesses as a result.¹⁸ Furthermore, citizens took part in gathering evidence, hearing cases and delivering judgments.¹⁹ However, legal representation was prohibited, even for the most serious cases.²⁰ A large majority of the judges were lay citizens with integrity, who were elected by the citizens.²¹

The judges of the *gacaca* courts could order a perpetrator to perform community service even for serious crimes,²² because the accused persons who confessed were given reduced sentences.²³ Community service as a sentence was incentivized by the perpetrators contributing in the restitution of victims, for instance by building houses in place of those that had been destroyed.²⁴ Furthermore, the perpetrators could provide accounts of their crime including details of co-perpetrators, which information contributed to truth finding and justice.²⁵ The use of public apologies, seeking forgiveness from the victims and seeking indulgence from the community promoted rehabilitation to the victims and the reintegration of the perpetrators within the community.²⁶

By the time the *gacaca* courts were dissolved, they had successfully tried more cases than national courts and the ICTR.²⁷ However, despite the success of *gacaca* courts, they have been criticized for violating human rights. For instance, legal representation was prohibited,

¹⁷ Husye L, Salter M, 'Traditional justice and reconciliation after violent conflict' *International Institute for Democracy and Electoral Assistance* (2008), 39.

¹⁸ De Brouwer A, Ruvebana E, 'The legacy of the *gacaca* courts in Rwanda' *International Criminal Law Review*, 2013, 941.

¹⁹ De Brouwer A, Ruvebana E, 'The legacy of the *gacaca* courts in Rwanda' *International Criminal Law Review*, 2013, 973.

²⁰ Chakravarty A, 'Gacaca courts in Rwanda: explaining divisions within the human rights community' *Yale Journal of International Affairs*, (2006), 132.

²¹ De Brouwer A, Ruvebana E, 'The legacy of the *gacaca* courts in Rwanda' *International Criminal Law Review* (2013), 941.

²² United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa', 37.

²³ United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa', 37.

²⁴ Chakravarty A, 'Gacaca courts in Rwanda: explaining divisions within the human rights community' *Yale Journal of International Affairs* (2006), 132.

²⁵ Husye L, Salter M, 'Traditional justice and reconciliation after violent conflict' *International Institute for Democracy and Electoral Assistance* (2008), 38.

²⁶ De Brouwer A, Ruvebana E, 'The legacy of the *gacaca* courts in Rwanda' *International Criminal Law Review*, (2013), 942.

²⁷ United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa', 37.

which is a requirement of a fair trial.²⁸ For serious crimes that carry drastic sentences, the absence of legal representation greatly jeopardizes the trial of the accused person.²⁹

4.1.2 Abunzi

Abunzi are local mediators in Rwanda mandated to use mediation in conflict resolution with the aim of finding a mutually acceptable solution to both parties in the conflict.³⁰ They provide a hybrid form of justice that combines traditional methods of justice with modern ones.³¹ They were reintroduced in Rwanda in 2004 as Mediation Committees and were formed in order to reduce the backlog of cases, to decentralize justice, and to provide accessible and affordable justice.³² Mediation Committees enable obligatory mediation prior to submission of a case before the highest degrees of the court.³³

Abunzi are recognized by Article 159 of the Rwandan Constitution to deal with civil and criminal cases in Rwanda.³⁴ The Organic Law No. 31/2006 provides for the jurisdiction, functioning and competence of *Abunzi* Mediation Committees.³⁵ The jurisdiction of the *abunzi* is at the cell and sector level comprising 12 volunteers who are residents, at least 30% being women in accordance with the Rwandan Constitution.³⁶ The mediators are chosen among citizens with integrity.³⁷ A bureau heads the Committee, which comprises a president, vice-

²⁸ Article 14(d), *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

²⁹ Chakravarty A, 'Gacaca courts in Rwanda: explaining divisions within the human rights community' *Yale Journal of International Affairs* (2006), 132.

³⁰ Mutisi M, Sansculotte-Greenidge K, 'Integrating traditional and modern conflict resolution: experiences from selected cases in eastern and the horn of Africa', *The African Centre for the Constructive Resolution of Disputes* (2012), 41.

³¹ <<http://www.minijust.gov.rw/services/abunzi/abunzi-achievements/>> on 13 September 2017.

³² <<http://www.minijust.gov.rw/services/abunzi/abunzi-achievements/>> on 13 September 2017.

³³ Article 3, *Organic Law on the Organisation, Jurisdiction, Competence and Functioning of the Mediation Committee* (2006).

³⁴ Article 159, *Constitution of Rwanda* (2003).

³⁵ *Organic Law on the Organisation, Jurisdiction, Competence and Functioning of the Mediation Committee* (2006). See also: *Organic Law on the Organisation, Jurisdiction, Competence and Functioning of the Mediation Committee* (2010).

³⁶ *Organic Law on the Organisation, Jurisdiction, Competence and Functioning of the Mediation Committee* (2010).

³⁷ Mutisi M, 'The Abunzi mediation in Rwanda: opportunities for engaging with traditional institutions of conflict resolution' <<http://www.accord.org.za/publication/the-abunzi-mediation-in-rwanda/>> on 13 September 2017.

president, secretary and the rest of the members.³⁸ The president and vice-president are elected by the committee who serve a two-year renewable term.³⁹ Three mediators hear and resolve the dispute, two mediators being chosen by each party and the third chosen by the mediators.⁴⁰ Proceedings are conducted in public and community participation is encouraged.⁴¹ Mediation is obligatory prior to submitting a case to first degree courts which encourages local capacity in the resolution of conflicts in Rwanda.⁴²

Particularly, article 9 of the Organic Law (2010) provides the *abunzi* with criminal jurisdiction over matters that are less than 3 million Rwandan francs.⁴³ Such matters include: theft, damage to crops, larceny, insult, within members of the family and killing or wounding animals without intent.⁴⁴ Because the aim of the *abunzi* is to promote restoration and relationships within the community, retribution is not the objective.⁴⁵ Consequently, the Mediators are not to pronounce punitive sentences.⁴⁶ The Mediators decision is carried out voluntarily but in the event of non-compliance, it is enforced by the President of the Primary Court.⁴⁷

Despite the advantages of the *abunzi*, they have significant challenges. Firstly, the Mediators consist of lay citizens who have little to no legal knowledge.⁴⁸ In addition, compliance with the *abunzi* has been credited to the state-backed threats that coerce the

³⁸ Mutisi M, Sansculotte-Greenidge K, 'Integrating traditional and modern conflict resolution' 48.

³⁹ Mutisi M, Sansculotte-Greenidge K, 'Integrating traditional and modern conflict resolution' 48.

⁴⁰ Mutisi M, Sansculotte-Greenidge K, 'Integrating traditional and modern conflict resolution' 49.

⁴¹ Mutisi M, Sansculotte-Greenidge K, 'Integrating traditional and modern conflict resolution' 51.

⁴² Mutisi M, 'The Abunzi mediation in Rwanda: opportunities for engaging with traditional institutions of conflict resolution' <<http://www.accord.org.za/publication/the-abunzi-mediation-in-rwanda/>> on 13 September 2017.

⁴³ Article 9, *Organic Law on the Organisation, Jurisdiction, Competence and Functioning of the Mediation Committee* (2010).

⁴⁴ Article 9, *Organic Law on the Organisation, Jurisdiction, Competence and Functioning of the Mediation Committee* (2010).

⁴⁵ Mutisi M, 'The Abunzi mediation in Rwanda: opportunities for engaging with traditional institutions of conflict resolution' <<http://www.accord.org.za/publication/the-abunzi-mediation-in-rwanda/>> on 13 September 2017.

⁴⁶ *Organic Law on the Organisation, Jurisdiction, Competence and Functioning of the Mediation Committee* (2006).

⁴⁷ <<http://www.rwandapedia.rw/explore/abunzi>> on 30 November 2017.

⁴⁸ <<http://www.rwandapedia.rw/explore/abunzi>> on 30 November 2017.

community to comply with the *abunzi*, which may in turn lead to retributive measures for non-compliance.⁴⁹

Nonetheless, Kenya may learn from the *abunzi* by encouraging the use of mediation in resolving criminal matters using TDRMs, institutionalizing elders who can hear and determine the dispute, making TDRMs the dispute resolution mechanism of first instance and encouraging community participation in dispute resolution.

4.2 Conclusion

Gacaca courts and *abunzi* use traditional methods to resolve criminal disputes in Rwanda. They have had success and encouraged community involvement, ease of access of the courts, and the use of customary law. Both mechanisms have been successful in criminal justice delivery alongside national and international tribunals. This is because they allowed for the expedient delivery of justice, community inclusion and participation, access to justice, reconciliation, truth-finding and cohesiveness within the communities.⁵⁰ In addition, both systems have a defined institutional framework, are governed by the law and are decentralized.

The future of the implementation of TDRMs in criminal matters is bright in Africa, with many jurisdictions other than Rwanda implementing the same.⁵¹ Kenya can indeed borrow a leaf from Rwanda, particularly with the establishment of traditional courts, community participation in trials, passing less severe sentences in the instance of confessions for less serious crimes and the encouragement of minimum procedures in the administration of justice. Kenya should not be left behind but make strides in the implementation of TDRMs in criminal matters, even for the most serious crimes, and learn from more developed jurisdictions, with respect to TDRMs in criminal matters.

⁴⁹ Mutisi M, 'The Abunzi mediation in Rwanda: opportunities for engaging with traditional institutions of conflict resolution' <<http://www.accord.org.za/publication/the-abunzi-mediation-in-rwanda/>> on 13 September 2017.

⁵⁰ Husye L, Salter M, 'Traditional justice and reconciliation after violent conflict' *International Institute for Democracy and Electoral Assistance* (2008), 40.

⁵¹ Examples of such jurisdictions include: Malawi, Nigeria, Mozambique, Namibia, Niger and Zambia. See: United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa'.

CHAPTER FIVE

SUITABILITY OF TDRMS IN CRIMINAL MATTERS IN KENYA

5.1 Introduction

This chapter contains an assessment of the characteristics of TDRMs in order to establish the attributes that make them appropriate for the resolution of criminal disputes in Kenya.

5.2 Positive attributes

5.2.1 Recognition in Kenya

Courts and tribunals are to promote the use of TDRMs according to article 159(2)(c) of the Constitution.¹ This provision contributes to the realization of constitutional enshrinements by requiring justice to be administered without undue regard to procedural technicalities;² and without delays.³

Courts have continued to recognize TDRMs. The High Court case of *Raphael Lukale v Elizabeth Mayabi & another*⁴ was a family dispute pitting a mother and her lover on one side and the children with the deceased's husband on the other. The court was of the opinion that all the issues should be first dealt with at the clan level through reconciliation and TDRMs. Even though there is a lack of authorities on the operation of Luhya dispute resolution mechanisms, the Court opined that they exist and that the family should be given an opportunity to explore them before proceeding with the court process.

5.2.2 Promotion of restorative justice

Restorative justice is a theory of justice that emphasizes the repairing of harm through cooperative processes which include all the relevant parties.⁵ Restorative justice plays a large role in promoting social cohesion and community harmony.⁶ In criminal matters, offensive acts are viewed as not only offending the state, but the victims, communities and the perpetrators themselves.⁷ Secondly, more parties to the crime are involved including the victim and community, rather than giving roles solely to the government and the offender.⁸ Furthermore, the measure of success is on the amount of harm that is repaired and prevented.⁹

¹Article 159(2)(c), *Constitution of Kenya* (2010).

² Article 159(2)(d), *Constitution of Kenya* (2010).

³ Article 159(2)(b), *Constitution of Kenya* (2010).

⁴ *Raphael Lukale v Elizabeth Mayabi & another* [2016] eKLR.

⁵ <<http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj%20brief.pdf>> on 12 December 2017.

⁶ Goa J, '(Informal) Traditional Justice System' 3.

⁷ <<http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj%20brief.pdf>> on 12 December 2017.

⁸ <<http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj%20brief.pdf>> on 12 December 2017.

⁹ <<http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj%20brief.pdf>> on 12 December 2017.

Restorative justice is contrasted with retributive justice, which imposes pain and punishment for purposes of vindication.¹⁰ Retribution is aimed at restoring the legal balance that has been upset by the commission of a crime and is the essential characteristic of punishment.¹¹

TDRMs bring about restorative justice as they address the interests of all parties to the conflict.¹² For instance, in *Republic v Juliana Mwikali Kiteme & 3 others*¹³ the accused were charged with murder. The prosecutor informed the court that conciliation was possible, after receiving information from the local elder. Affidavits of the brother and mother of the deceased had been filed to the effect that traditional compensation in the form of livestock had been paid in line with the Kamba customs and traditions. The court was of the opinion that the court should promote reconciliation as envisaged in the Constitution.¹⁴ This case exemplifies the elements of restorative justice of involving the victims and the community, that should be used in criminal justice in Kenya.

For the *abunzi* of Rwanda, their aim is to promote restoration and relationships within the community, retribution is not the objective.¹⁵ Consequently, the Mediators are not to pronounce punitive sentences.¹⁶

With the *gacaca* courts, the community could participate in the proceedings as they were conducted openly, and some citizens were able to serve as witnesses as a result.¹⁷ Furthermore, citizens took part in gathering evidence, hearing cases and delivering judgments.¹⁸ The use of public apologies, seeking forgiveness from the victims and seeking

¹⁰ Ng'etich R, 'Resolving community land disputes using traditional justice systems in Kenya' 15.

¹¹ Kenya Laws Online, <<http://kenyalawsonline.blogspot.co.ke/2013/06/kenya-criminal-law.html>> on 11 September 2017.

¹² Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya:', 208-209.

¹³ *Republic v Juliana Mwikali Kiteme & 3 others* [2017] eKLR.

¹⁴ *Republic v Juliana Mwikali Kiteme & 3 others* [2017] eKLR.

¹⁵ Mutisi M, 'The Abunzi mediation in Rwanda: opportunities for engaging with traditional institutions of conflict resolution?' <<http://www.accord.org.za/publication/the-abunzi-mediation-in-rwanda/>> on 13 September 2017.

¹⁶ *Organic Law on the Organisation, Jurisdiction, Competence and Functioning of the Mediation Committee* (2006).

¹⁷ De Brouwer A, Ruvebana E, 'The legacy of the *gacaca* courts in Rwanda' 941.

¹⁸ De Brouwer A, Ruvebana E, 'The legacy of the *gacaca* courts in Rwanda', 973.

indulgence from the community promoted rehabilitation to the victims and the reintegration of the perpetrators within the community.¹⁹

Reconciliation and restoration of justice have become an important aspect in criminal matters today and the application of TDRMs in criminal matters would be in support of the same.

5.2.3 Accessibility and human rights

Firstly, TDRMs are inexpensive as there are no litigation fees required.²⁰ This makes TDRMs financially accessible to members of a given society. In addition, TDRMs are exercised by trusted people of integrity,²¹ who are known to the community.²² Moreover, the decisions are made on the basis of rules that members of the community understand.²³ Village leaders, elders and traditional justice actors speak the same language which makes the attainment of justice easier for the local community.²⁴ Furthermore, the decisions and process involved using TDRMs may be made promptly compared to the bureaucratic formal justice system.²⁵ TDRMs are also less prone to corruption.²⁶ TDRMs also promote human rights by promoting the right to be tried without undue delay²⁷ and victim's rights.²⁸

By contrast, formal justice systems are more procedural, time-consuming and expensive, with the courts being accessible mostly in urban areas.²⁹ The use of TDRMs would therefore facilitate access to justice.

¹⁹<http://www.burmalibrary.org/docs21/A_Basic_Introduction_to_Customary_Justice_Systems.pdf> on 28th December 2017.

²⁰ Roder T, 'Informal justice systems: challenges and perspectives', 58.

²¹ Goa J, '(Informal) Traditional Justice System'

<http://www.academia.edu/4061034/_Informal_Traditional_Justice_System> on 17 December 2017.

²² Roder T, 'Informal justice systems: challenges and perspectives'. 58.

²³ Roder T, 'Informal justice systems: challenges and perspectives', 58.

²⁴ Goa J, '(Informal) Traditional Justice System'

<http://www.academia.edu/4061034/_Informal_Traditional_Justice_System> on 17 December 2017.

²⁵Goa J, '(Informal) Traditional Justice System'

<http://www.academia.edu/4061034/_Informal_Traditional_Justice_System> on 17 December 2017.

²⁶ Roder T, 'Informal justice systems: challenges and perspectives', 58.

²⁷ United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa' 54.

²⁸ United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa' 54.

²⁹ Muigua K & Kariuki F, 'ADR, access to justice and development in Kenya' *Strathmore Law Journal* (2014), 1.

5.2.4 Flexibility

TDRMs adapt to changing circumstances more easily because the processes, laws and sanctions contained in customary law are uncodified and negotiable.³⁰ In the formal justice system, heavy reliance is placed on the rigid codified laws that require lengthy modification processes to allow their application in different circumstances.³¹ The nature of customary law is relevant because TDRMs are derived from customary law, the nature of which affects the application of TDRMs.³²

5.2.5 Legitimacy

Traditional elders who listen to disputes are appointed from members of the local community who are people of integrity, as evidenced by the *Njuri Ncheke* of Kenya,³³ the *Abunzi* of Rwanda³⁴ and the adjudicators of the *Gacaca* courts of Rwanda.³⁵ As a result, these elders possess cultural and social legitimacy in their respective communities.³⁶ This is contrasted with the adjudicators in the formal justice systems who may not be familiar with the social, cultural and historical background of the parties involved.³⁷ Resolving criminal matters using TDRMs will therefore encourage the legitimacy of the process.

5.3 Negative attributes

5.3.1 Contradictory jurisprudence

As discussed in Chapter 2, there are conflicting decisions regarding whether TDRMs should be applied in adjudicating murder. These are the contrasting decisions of *Republic v Abdulahi Noor Mohamed (alias Arab)* and; *Republic v Mohamed Abdow Mohamed* and *Republic v Juliana Mwikali Kiteme & 3 others* (pro TDRMs). Such contradiction makes the future of TDRMs uncertain, which undermines its applicability in criminal matters in Kenya.

³⁰ Peters E and Ubink J, 'Restorative and flexible customary procedures and their gendered impact: a preliminary view on Namibia's formalization of Traditional Courts', 301.

³¹ Goa J, '(Informal) Traditional Justice System' 3.

³² Jackson T, *The law of Kenya*, 3ed, Kenya Literature Bureau, Nairobi, 1988, 21.

³³ <<https://www.standardmedia.co.ke/article/2000183464/19-experts-join-njuri-ncheke-elders-council>> on 17 December 2017.

³⁴ Mutisi M, 'The Abunzi mediation in Rwanda: opportunities for engaging with traditional institutions of conflict resolution' <<http://www.accord.org.za/publication/the-abunzi-mediation-in-rwanda/>> on 13 September 2017.

³⁵ Powers S, 'Rwanda's *gacaca* courts: implications for international criminal law and transitional justice' 2.

³⁶ <http://www.academia.edu/4061034/_Informal_Traditional_Justice_System> on 17 December 2017.

³⁷ *Raphael Lukale v Elizabeth Mayabi & another* [2016] eKLR.

5.3.2 Lack of legal representation

Legal representation is a requirement of a fair trial, which is due to every human being.³⁸ However, legal representation was prohibited, even for the most serious cases in the *Gacaca* courts of Rwanda as discussed in the case study of Rwanda in Chapter 4.³⁹ The lack of legal representation is a violation of Article 14 of the ICCPR and article 50 of the Constitution, which provides for the right of a fair trial.⁴⁰ In addition, General Comment No. 32⁴¹ on the right to a fair trial states that article 14 is relevant where States have recognized courts based on customary law, that use TDRMs, as the right to a fair trial ought to be respected.⁴² Therefore, as Kenya considers the application of TDRMs in criminal matters, the right to a fair trial should be respected, and more particularly, the right to legal representation.

5.3.3 Protection of women and children

Unfortunately, women and children rights in customary law do not receive too much attention and TDRMs involve decisions that may perpetuate the subordination of women or the exploitation of children.⁴³ These involve issues such as the women's right to inheritance and the marrying off of children for economic gain.⁴⁴

5.3.4 Uncertainty of the law

Firstly, on uncertainty of jurisdiction, Kenya consists of more than 40 tribes, each tribe having its their own culture, customs and traditions. As a result, each tribe has its own manner of resolving disputes according to their traditions. The challenge arises when parties to a dispute belong to different tribes, each tribe having jurisdiction over the dispute.

In addition, there exists an unclear interface between the formal and traditional justice system in Kenya.⁴⁵ TDRMs have just been recognized but with no guidelines as to when, how,

³⁸ Article 14(d), *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

³⁹ Chakravarty A, 'Gacaca courts in Rwanda: explaining divisions within the human rights community', 132.

⁴⁰ Article 14(d), *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171. See also: Article 49(1)(c) and 50(2)(g) and (h), *Constitution of Kenya* (2010).

⁴¹ *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007. See also: United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa', 44.

⁴² United Nations Human Rights Commission, 'Human rights and traditional justice systems in Africa', 44.

⁴³ United Nations Entity for Gender Equality and the Empowerment of Women, 'Informal Justice Systems', 9.

⁴⁴ United Nations Entity for Gender Equality and the Empowerment of Women, 'Informal Justice Systems', 9.

⁴⁵ 'Traditional justice systems in the Pacific, Indonesia and Timor-Leste', 22. This paper was commissioned by UNICEF Papua New Guinea for the 2009 Justice for Children in the Pacific, Indonesia and Timor-Leste, EAPRO Sub-Regional Workshop.

where they may be used in relation to the formal justice system.⁴⁶ There are no laws outlining the procedure to be followed in applying TDRMs in criminal matters, including: the point at which TDRMs may be used in criminal procedure, the types of criminal matters that are in the scope of TDRMs; codification of customary laws that may be applied in TDRMs, the criteria for selecting elders and choosing cases, and so forth.⁴⁷ This presents a challenge in determining the application of TDRMs in criminal matters.

Generally, the unclear legal framework on TDRMs advances a challenge to its application in Kenya, particularly for criminal matters.⁴⁸

5.3.5 Negative Attitude

Firstly, the place of customary law on the hierarchy of norms is at the bottom, which hampers its application.⁴⁹ In addition, the application of customary law is subjected to a 3-part checklist for it to be applicable in Kenya. The application of TDRMs is hampered because several requirements (discussed above) have to be exhausted before its application can be lawful.

Moreover, there is a negative attitude towards TDRMs amongst lawyers and the society due to the modernization, urbanization and influence from the Western world.⁵⁰ Such views are in favour of formal dispute resolution mechanisms that do not employ TDRMs. There is also a declining influence of the institution of elders due to the breakdown of communal, social and kinship ties that held communities and peoples together before colonialism.

5.4 Conclusion

Despite the challenges that TDRMs possess, they are legitimate, flexible, accessible and promote restorative justice. These characteristics are lacking in the formal justice system today, which systems are largely used to adjudicate criminal matters in Kenya. Therefore, TDRMs should be encouraged in resolving criminal disputes in Kenya.

⁴⁶ 'Traditional justice systems in the Pacific, Indonesia and Timor-Leste', 22.

⁴⁷ Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: case study of Republic v Mohamed Abdow Mohamed [2013] eKLR', 210-211.

⁴⁸ Kariuki F, 'African traditional justice systems' 13.

⁴⁹ Section 3, *Judicature Act* (Act No. 10A of 2012).

⁵⁰ <<https://www.nation.co.ke/oped/opinion/Traditional-dispute-resolution-is-justice/440808-3407644-14dfh0nz/index.html>>

CHAPTER SIX

FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

6.1 Introduction

This chapter contains the findings, recommendations and conclusions of the study. The chapter will demonstrate how the research objectives have been met and whether the study hypothesis has been proved or disproved.

6.2 Findings

6.2.1 The treatment of TDRMs in criminal matters in Kenya

The legal manifestation of TDRMs in Kenya promotes and curtails its application in criminal matters in Kenya, as explained in the previous chapters. The international conventions promote the use of TDRMs. However, the Kenyan repugnancy clause, limits the application of TDRMs as provided for by article 159 of the Constitution as well as the Judicature Act.

In addition, there is conflicting jurisprudence, where for instance, TDRMs are upheld in *Republic v Mohamed Abdow Mohamed* but not in *Republic v Abdulahi Noor Mohamed (alias Arab)* despite both cases being based on murder charges. The challenges presented by the legal manifestation of TDRMs in Kenya do indeed hamper the application of TDRMs in criminal matters. There is however hope for its application in the future, given that TDRMs are provided for by the Constitution and the increased jurisprudence promoting their use.

6.2.2 The suitability of TDRMs to criminal matters

Despite the challenges that TDRMs face, the study has established that they are legitimate, flexible, accessible and promote restorative justice. These characteristics are lacking in the formal justice system today, which systems are largely used to adjudicate criminal matters in Kenya. Therefore, TDRMs should be encouraged in resolving criminal disputes in Kenya.

6.3 Recommendations

6.3.1 The need for consistent jurisprudence

As discussed above, the Courts have produced contrasting jurisprudence regarding the application of TDRMs in criminal matters, specifically on murder charges, as evidenced in contrasting decisions of *Republic v Abdulahi Noor Mohamed (alias Arab)* and *R v Lenaas Lenchura* on the one hand (against TDRMs); and *Republic v Mohamed Abdow Mohamed* and *Republic v Juliana Mwikali Kiteme & 3 others* (pro-TDRMs) on the other hand. It would seem however that the most recent decision of *Republic v Juliana Mwikali Kiteme & 3 others* sets a positive trajectory in the application of TDRMs in murder cases, which decision is in tandem with Article 159(2)(c) of the Constitution of Kenya (2010).

6.3.2 The need to remove barriers hindering the application of TDRMs in criminal cases

There is a need to ensure that the legal barriers relating to TDRMs are removed, so that TDRMs may be used widely and certainly. This includes section 176 of the Penal Code, section 3 of the Judicature Act and article 159 of the Constitution of Kenya 2010 as discussed in Chapter 2.

6.3.3 The need to implement and encourage TDRMs institutions

As examined in the case study of Rwanda in Chapter 4, village elders and members of the community with integrity were used in the successful *Gacaca* courts and are continued to be used in the constitution of the *Abunzi* (Mediation Committees) of Rwanda to date. Kenya should implement the same by encouraging the institution of elders in various communities, in order to decentralize and increase access to justice in rural areas.

6.3.4 The need for a TDRMs policy

There is a strong need to create a policy that provides a guideline as to when, where and how TDRMs should be used, especially with regard to criminal matters in Kenya. Creating such a policy will increase the legitimacy and certainty of TDRMs and consequently promote their use in criminal matters in Kenya. A policy in place will also influence a positive attitude towards TDRMs with regards to lawyers, judges and citizens, thus promoting their use. Such a policy should also address the concerns of human rights and due process that have been raised in this study, so as to conform to international and national standards.

6.4 Conclusions

The study has proved its hypothesis, achieved its objectives and responded to the statement of the problem. The objectives were to:

- i. Examine the legal framework for TDRMs in criminal matters in Kenya.
- ii. Analyse the nature of criminal matters in Kenya.
- iii. Assess the opportunities and challenges of using TDRMs in criminal matters in Kenya.
- iv. Make recommendations on the application of TDRMs in criminal matters in Kenya.

6.4.1 Objective i

The study has examined the legal manifestation of TDRMs in light of the 2010 Constitutional dispensation, highlighting the opportunities and shortcomings that promote and hamper the application of TDRMs in criminal matters in Kenya.

6.4.2 Objective ii

The study has analysed the nature of criminal matters in Kenya which highlights the opportunity for the application of TDRMs in promoting the rights of the victim, promoting reconciliation amongst the parties and promoting restorative justice.

6.4.3 Objective iii

By analysing the nature of TDRMs, the study has examined the inherent features of TDRMs that encourage its application in criminal matters despite its challenges.

6.4.4 Objective iv

The study has suggested several measures that may be implemented to encourage and strengthen the legitimacy and use of TDRMs in criminal matters in Kenya.

6.4.5 Hypothesis

The hypothesis was that TDRMs are the most appropriate dispute resolution mechanisms for resolving criminal matters in Kenya.

The study has proved the hypothesis by outlining the positive inherent features of TDRMs that make them most suitable for solving criminal disputes, while highlighting the challenges facing access to justice in formal courts. These features have been analysed in Chapter 5, which is informed by the case study in Chapter 4 and the nature of criminal matters in Chapter 3.

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